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Supreme Court, U.S.
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Nº. 97-1248

In The

Supreme Court of The United States

October Term 1997

CALLAWAY COUNTY
AMBULANCE DISTRICT

Petitioner,

v.

CHRISTINA PEEPER

Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

REPLY BRIEF OF PETITIONER

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The Court of Appeals Improperly Decided the Case on Issues not Raised in the District Court or on Appeal

The Eighth Circuit found that Petitioner violated Respondent's first amendment associational rights and her fourteenth amendment equal protection rights although Respondent never asserted, at trial or on appeal, violations of those rights. Instead, Respondent consistently claimed only a violation of her right to free speech under the first amendment. In her Brief in Opposition, Respondent contends for the first time that she actually raised a violation of her associational rights, quoting the conclusion of her trial brief and its reference to "constitutional rights of free speech and association". (Respondent's Brief in Opposition at p. 9) This lone reference to associational rights, buried in what amounts to a prayer for relief, does not amount to an actual argument that her associational rights were violated.

Perhaps the fleeting nature of the quoted reference caused Respondent to forget she had made it. In her Appellant's Suggestions in Opposition to Petition for Rehearing En Banc filed in the Eighth Circuit, (which Petition was denied by a 6-5 vote), Respondent did not claim she had asserted a violation of her associational rights in response to Petitioner's argument that such was not a proper basis for relief. Indeed, Respondent acknowledged more than once that she had not raised such a claim.

"While it is true that Peeper characterized the First amendment violations of speech and expression rights..."

(Suggestions in Opposition to Petition for Rehearing, p.4) "Although appellant has argued on appeal that the infringements of resolution #2 violate her First and Fourteenth Amendment rights of speech and expression, the fact that this Court determined that the First Amendment violation was in the nature of a violation of her association rights or her fourteenth Amendment rights of equal protection does not offend the precedent..." (Suggestions in Opposition to Petition for Rehearing, p. 5) The quoted passages confirm that Respondent has acknowledged she never contended Petitioner's actions violated her associational or equal protection rights.

Likewise, Respondent did not assert a violation of her associational or equal protection rights in her complaint. She alleged that Petitioner did "violate Plaintiff's rights under the First and Fourteenth Amendments to the U.S. Constitution as more specifically enumerated in this Complaint." (R.Apdx B-3, paragraph 3) Respondent "enumerated" as follows: "11. The actions... constitute a violation of Plaintiff's right to the free exercise of speech and expression protected under the First Amendment of the U.S. Constitution made applicable to political subdivisions of the State of Missouri through the Fourteenth Amendment of the U.S. Constitution... 12... a prior restraint on Plaintiff's free exercise of her right of speech and expression... 13... deprived by Defendant to the free exercise of speech and expression 14... restraining Plaintiff's free exercise of her rights of speech and expression...

WHEREFORE, Plaintiff prays the Court to issue... injunction... prohibiting Defendant from... prohibiting Plaintiff from exercising her rights under the First and Fourteenth Amendments to freely express herself". (R.Apdx. B-5 through 7)

Respondent also asserts that, even if she did not raise the issues of associational and equal protection rights, the Eighth Circuit was nonetheless justified in deciding the case on those issues, citing U.S. Nat. Bank of Or. v. Independent Ins. Agents, 508 U.S. 439 (1993) and U.S. v. Olano, 507 U.S. 725 (1993). Neither decision of this Court is of any assistance to Respondent.

The U.S. Nat. Bank case involved a situation in which the Comptroller of the Currency interpreted a statutory provision, "section 92". The Court of Appeals, recognizing that there was some authority for the proposition that section 92 had been repealed, ordered the parties to file supplemental briefs directed to the issue of section 92's continued vitality, and decided the statute had been repealed. U.S. Nat. Bank at 441-446. Thus, the issue raised by the parties before the Court of Appeals in U.S. Nat. Bank was the proper interpretation of a statute and the issue raised sua sponte by the court was whether the statute existed as good law.

In holding that the Court of Appeals had properly decided the question, though not raised by the parties, this Court noted that the issue was "antecedent to... and ultimately dispositive of the dispute before it". U.S. Nat. Bank at 447.

That contrasts with the decision of the Eighth Circuit in ruling this case on different constitutional grounds than those raised by Respondent. The Court also placed great importance on the fact that, by ordering supplemental briefing and raising the issue at oral argument, the Court of Appeals gave "the parties ample opportunity to address the issue" before deciding the case on that basis. U.S. Nat. Bank at 448. The Eighth Circuit gave Petitioner no such opportunity in this case.

Respondent is apparently operating under the assumption that U.S. v. Olano, supra, is controlling precedent as to the issues raised by the Petition for Writ of Certiorari herein. "Petitioner does not argue here that this court (sic) should revisit Olano". (Brief in Opposition, p.6) Respondent is absolutely correct that Petitioner does not urge reversal of Olano. The case dealt with the standard of appellate review in a criminal matter and hinged on interpretation of the "plain error" standard of Federal Rule of Criminal Procedure 52(b). Olano at 731,732. Petitioner does not attack Olano because Petitioner can discern no way in which Olano is remotely relevant to this case.

Petitioner has not Misstated the Record

At several places in her Brief in Opposition, Respondent accuses Petitioner of misstating the record below. As shown above, Petitioner has not misled this Court as to whether Respondent raised the issues of a violation of her

associational or equal protection rights. Respondent did not raise the issues, contrary to the assertions contained in her Brief in Opposition at pages 7 through 10.

Likewise, Respondent states that Petitioner has not accurately stated the facts with regard to discussions that were had prior to adoption of Resolution #2 at Petitioner's board meeting on May 28, 1996, and with regard to the extent of Respondent's participation in Petitioner's meetings on April 23, 1996, May 28, 1996, and June 11, 1996, while Petitioner was operating under one or the other of the resolutions it passed. (Brief in Opposition, pp. 2-3) However, Petitioner states the facts simply as they were found by the district court. Concerning the discussion had prior to passage of Resolution #2 at the May 28, 1996, meeting, Petitioner's statement is taken from the district court's Finding of Fact number 16. (Apdx. B-19) As to the extent of Respondent's participation in meetings, the facts as stated by Petitioner were found by the district court at Findings of Fact 13, 21 and 23. (Apdx. B-18, 19, 20)

Respondent also asserts that Petitioner "misstates Respondent's testimony about her understanding of the conflict of interest law." (Brief in Opposition, p. 4) Again, Petitioner has simply stated the facts as found by the district court. The statements Respondent complains of in this regard are taken from the district court's Findings of Fact 34 and 35. (Apdx. B-21)

Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted.

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